EXXON CHEMICAL (MALAYSIA) SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-01-95-1998]
24 NOVEMBER 2005

REVENUE LAW: *Income tax - Deduction - Appellant taxpayer sought to deduct monies set aside for a benefit plan for its employees from its income - Whether deductible - Whether monies included under "expenses wholly and exclusively incurred" in s. 33(1) Income Tax Act 1967 - Income Tax Act 1967, s. 33(1)*

WORDS & PHRASES: *'expenses wholly and exclusively incurred" - Income Tax Act 1967, s. 33(1) - Whether includes a sum which taxpayer is under an obligation to pay*

STATUTORY INTERPRETATION: *Taxing statute - Strict interpretation - Whether to be applied against revenue - Whether must be resolved in taxpayer's favour if ambiguous*

The appellant taxpayer constituted a benefit plan for its employees and sought to deduct the monies set aside for this plan from its income. The respondent/revenue disagreed, saying that the money for the plan was a chargeable gain, and refused to allow the deduction from the assessments raised against the appellant. The appellant appealed to the Special Commissioners, which held against the appellant and its subsequent appeal to the High Court was also unsuccessful. Hence, the present appeal. This case turned on the interpretation to be given to the opening words of s. 33(1) of the Income Tax Act 1967 ('the Act'), the relevant phrase being "expenses wholly and exclusively incurred". Revenue's argument was that it must be money actually spent and the benefit plan was in respect of monies that were never "incurred". They were there to meet a mere contingency; thus, they formed part of the adjusted income and attracted tax. The appellant relied on the Privy Council decision of *Commissioner for Inland Revenue v. Lo & Lo*, which turned on the interpretation of s. 16(1) of the Inland Revenue Ordinance of Hong Kong. Learned counsel for revenue submitted that *Lo & Lo (supra)* was

distinguishable because of the difference in the actual wording of s. 16 of the Hong Kong Ordinance. It also submitted that s. 33(1) of the Act, being a taxing statute, should be given a strict construction and hence the words "expenses wholly and exclusively incurred" should receive a narrow interpretation.

Held (allowing the appeal)
Per Gopal Sri Ram JCA:

[1] The words "expenses wholly and exclusively incurred" appearing in s. 33(1) of the Act include a sum which the taxpayer is under an obligation to pay. That is the proposition established by *Lo & Lo (supra)* and being a Privy Council decision from another jurisdiction on a provision that is materially similar to our written law, it must be given great weight. (p 816 c)

[2] The fact that the appellant's employees did not actually receive the money in a given year did not matter. For, had any of those who were eligible to receive the benefit claimed it, it would have then been impossible for the appellant to have lawfully resisted the claim. The fact that the employees thought it fit not to make a claim but to defer it did not make the obligation to pay an expense that was incurred by the appellant non-existent. Accordingly, it came within what revenue lawyers commonly call "the basket" in s. 33 of the Act. (p 816 g)

[3] The principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour. The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. In the instant case, learned counsel for revenue was asking this court to go the other way, which would be standing the true principle on its head. (p 817 a-b)

[4] Furthermore, the two authorities relied on by learned counsel for revenue, *Owen v. Southern Railway of Peru Ltd* and *Nielsen Development Laboratories Pty Ltd v. Federal Commissioner of Taxation*, were readily distinguishable from the present instance. (p 817 c-g)

[5] For the reasons already given, the Special Commissioners and the High Court erred in holding against the appellant. The appeal was allowed and the orders in the High Court and the Deciding Order of the Special Commissioners were set aside. The relevant assessments imposed on the appellant were hereby discharged. (p 818 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu/pembayar cukai memperkenalkan suatu pelan kebajikan untuk pekerja-pekerjanya dan kemudian memotong dari pendapatannya perbelanjaan yang dikeluarkan untuk pelan tersebut. Responden/pemungut cukai tidak bersetuju dengan mengatakan bahawa wang yang diperuntukkan untuk pelan tersebut adalah tertakluk kepada cukai, dan kerana itu, enggan membuat sebarang pemotongan pada taksiran yang dihantar kepada perayu. Perayu merayu ke Pesuruhjaya Khas, dan kemudian ke Mahkamah Tinggi, tetapi gagal dikedua-dua peringkat. Perayu merayu seterusnya. Di pendengaran, persoalan yang berbangkit adalah berkisar kepada tafsiran yang perlu diberi kepada ungkapan pembukaan di s. 33(1) Akta Cukai Pendapatan 1967 ('Akta'), iaitu ungkapan "expenses wholly and exclusively incurred". Hujah pemungut cukai adalah bahawa ia haruslah merupakan wang yang sebenarnya dibelanjakan, sedangkan pelan kebajikan adalah berkaitan wang yang tidak pernah "dibelanjakan". Wang tersebut hanya disediakan untuk memenuhi keadaan-keadaan tertentu yang berbangkit, dan kerana itu ia menjadi sebahagian daripada pendapatan yang diselaraskan yang tertakluk kepada cukai. Perayu bergantung kepada keputusan Majlis Privi dalam kes *Commissioner for Inland Revenue v. Lo & Lo*, yang berkisar sekitar pentafsiran s. 16(1) Ordinan Hasil Dalam Negeri, Hong Kong. Yang arif peguam pemungut cukai menghujah bahawa *Lo & Lo (supra)* boleh dibezakan disebabkan oleh perbezaan pada kata-kata sebenarnya dalam s. 16 Ordinan Hong Kong. Dihujahkan selanjutnya bahawa s. 33(1) Akta, sebagai statut cukai, hendaklah diberikan pentafsiran yang ketat, dan kerana itu perkataan "expenses wholly and exclusively incurred" harus dikenakan pentafsiran yang sempit.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR:

[1] Ungkapan "expenses wholly and exclusively incurred" di dalam s. 33(1) Akta meliputi jumlah yang mana pembayar cukai mempunyai obligasi untuk membayarnya. Inilah proposisi yang diutarakan oleh *Lo & Lo (supra)* dan, sebagai suatu keputusan Majlis Privi dari bidang kuasa lain atas peruntukan yang hampir serupa dengan undang-undang bertulis kita, ia harus diberikan pertimbangan yang teliti.

[2] Fakta bahawa pekerja-pekerja perayu sebenarnya tidak menerima wang dalam sesuatu tahun adalah tidak penting. Ini kerana, sekiranya mana-mana pekerja tersebut membuat tuntutan, adalah mustahil bagi perayu untuk tidak memenuhinya. Fakta bahawa pekerja-pekerja merasai sesuai untuk tidak membuat tuntutan atau untuk menangguhkan tuntutan tidak menghilangkan obligasi untuk membayar yang ditanggung oleh perayu. Dengan itu, ia terjumlah ke dalam apa yang sering digelar oleh peguam-peguam cukai sebagai "the basket" dalam s. 33 Akta.

[3] Prinsip bahawa peruntukan di dalam statut cukai harus dibaca secara ketat terpakai kepada pemungut cukai, tapi bukan untuk menfaatnya. Pepatah dalam undang-undang cukai adalah bahawa: tiada peruntukan jelas; tiada cukai. Jika terdapat sebarang keraguan, maka ia harus diputuskan secara yang memanfaatkan pembayar cukai. Akibat dari proposisi ini adalah bahawa bahagian-bahagian statut cukai yang berpihak kepada pembayar cukai hendaklah dibaca secara liberal. Dalam kes semasa, yang arif peguam pemungut cukai meminta mahkamah supaya melakukan sebaliknya. Ini samalah seperti membiarkan prinsip sebenar berdiri di atas kepala.

[4] Selain itu, kedua-dua autoriti yang dipakai oleh peguam pemungut cukai, *Owen v. Southern Railway of Peru Ltd* dan *Nielsen Development Laboratories Pty Ltd v. Federal Commissioner of Taxation*, jelas boleh dibezakan dari kes semasa.

[5] Atas alasan-alasan yang diberikan, Pesuruhjaya Khas dan Mahkamah Tinggi khilaf apabila membuat keputusan yang tidak berpihak kepada perayu. Rayuan dibenarkan dan perintah-perintah Mahkamah Tinggi serta Perintah Keputusan Pesuruhjaya Khas diketepikan. Taksiran yang dikenakan terhadap perayu juga dimansuhkan.

Case(s) referred to:

Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 ***(refd)***

Commissioner for Inland Revenue v. Lo & Lo [1984] 1 WLR 986 ***(foll)***

Director Geneal of Inland Revenue v. Kulim Rubber Plantations Ltd [1981] 1 MLJ 214 ***(foll)***

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Nielsen Development Laboratories Pty Ltd v. Federal Commissioner of Taxation 81 ATC 4 ***(dist)***

Owen v. Southern Railway of Peru Ltd [1954] 36 TC 602 ***(dist)***

Legislation referred to:

Income Tax Act 1967, s. 33(1)

Inland Revenue Ordinance [Hong Kong], s. 16(1)

For the appellant - WSW Davidson (Francis Tan & Lucy Chang with him); M/s Azman Davidson & Co

For the respondent - Hazlina Hussain (Ashrina Razman Ali with her)

[Appeal from High Court, Kuala Lumpur; Appeal No: R2-14-4-1998]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

The appellant taxpayer constituted a benefit plan for its employees. This is how the plan works. An employee will receive a lump sum payment when he or she retires or resigns or on his or her termination from service other than a termination for cause. So if an employee is dismissed for misconduct he or she will not receive anything from the benefit plan. The fund for this benefit plan is financed and administered entirely by the appellant. The employees make no financial contribution to that fund and there is no separate fund to which the employees make contributions. But there are conditions to be satisfied for an employee to receive this benefit. He or she must have served the appellant for at least 11 years. Once that condition is satisfied, the employee is regarded as having an accrued or vested right to receive the benefit. However, an employee who has served 11 years will not receive any benefit if he or she is terminated for cause. But the appellant as employer has a discretion whether to make any payment to such an employee. So much for the plan.

Now, the appellant sought to deduct the monies set aside for this plan from its income. Revenue did not agree. It said that the money for the plan was a chargeable gain. It refused to allow the deduction from the assessments raised against the appellant. The appellant appealed to the Special Commissioners. They held against the appellant. The appellant then appealed to the High Court which also found against it. And so the appellant has come before us.

This case turns on the interpretation to be given to the opening words of s. 33(1) of the Income Tax Act 1967 ("the Act"). These are the words of that provision: and I have placed emphasis on the relevant phrase:

> Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source …

Revenue's argument is simple enough. It says that the important words in s. 33(1) are "expenses wholly and exclusively incurred". In other words, it must be money actually spent. The benefit plan is in respect of monies that are never "incurred". They are there to meet a mere contingency. So they form part of the adjusted income and attract tax.

The appellant relies on *Commissioner for Inland Revenue v. Lo & Lo* [1984] 1 WLR 986. It is a decision of the Privy Council. It turned on the interpretation of s. 16(1) of the Inland Revenue Ordinance of Hong Kong. The relevant part of that section reads:

> (1) In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are **incurred** during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part for any period, including ... (emphasis added.)

The facts in *Lo & Lo* were these. Lo & Lo were a long established firm of solicitors and notaries practising in Hong Kong. In 1977 the firm introduced a condition of employment whereby a retiring member of its staff, who had completed 10 years of service, would become entitled to a lump sum payment roughly equivalent to 1/24 of his annual salary as at the date of retirement for each year of service. The Commissioner of Inland Revenue contended that the accrued liability of the firm to pay its staff was not an expense "incurred" within the meaning of section 16 of the Hong Kong Ordinance. The Board of Review (the equivalent of our Special Commissioners) held for the Commissioner. The High Court reversed and the Court of Appeal upheld the reversal. The Commissioner then appealed to the Privy Council which affirmed the courts below. Lord Brightman who delivered the Advice of the Board said this:

> For reasons already given, 'an expense incurred' is not confined to a disbursement, and must at least include a sum which there is an obligation to pay, that is to say an accrued liability which is undischarged. Their Lordships then ask themselves why the $50,000 in the example given is not to be considered a sufficiently accrued liability in the year 1977 to be admissible as an 'expense incurred' in that year within the meaning of the section? The only argument could be that the employee has not seen fit to exercise his right to demand payment, and that he might forfeit such right through misconduct. Neither element in the opinion of their Lordships is sufficient to disqualify the $50,000 as an 'expense incurred', given that such expression is not confined to a disbursement. The employee had a choice whether to receive payment of $50,000 on 31 December 1977 or to defer receipt of such payment to a later date. The firm could not resist the obligation to make such payment on 31 December 1977 if the employee chose to take the appropriate steps to demand it. Their Lordships consider that in such circumstances it would be placing an unduly narrow construction on s. 16 to deny such $50,000 the description of 'an expense incurred during the year 1977'. Their Lordships are therefore of the opinion that, on a proper construction of s. 16, the sum of $770,000, being the amount which long service employees could at the close of the year 1977 have demanded on retirement, was an expense incurred during that year.

Learned counsel for revenue submits that *Lo & Lo* is distinguishable because of the difference in the actual wording of s. 16 of the Hong Kong Ordinance. It is also submitted that s. 33(1), being a taxing statute, should be given a strict construction and hence the words "expenses wholly and exclusively incurred" should receive a narrow interpretation. The oft quoted judgment of Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 was prayed in aid of this submission. With respect, I am unable to agree with these arguments.

In the first place, the words "expenses wholly and exclusively incurred" appearing in s. 33(1) include a sum which the taxpayer is under an obligation to pay. That is the proposition established by Lo & Lo. Being a Privy Council decision from another jurisdiction on a provision that is materially similar to our written law, it must be given great weight. Here, I can do no better than to refer to the following passage in the judgment of Chang Min Tat FJ in *Director General of Inland Revenue v. Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214:

> This court has laid down in *Khalid Panjang & Ors v. Public Prosecutor (No 2)* [1964] MLJ 108 the principle that *a Privy Council decision on appeal from another country is binding on it and the other courts of this country if the appeal is on a provision of law in pari materia with a provision of the local law.* The decision in *Lasala v. Lasala* [1979] 2 All ER 1146, that the Privy Council would consider itself bound by a decision of the House of Lords must extend this principle to judgments of the House of Lords. Insofar as the decisions of other courts in these and other countries are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as *per incuriam*. Other than for these reasons, we should as a matter of judicial comity and for the orderly development of law, pay due and proper attention to them. (emphasis added.)

In the second place, the fact that the appellant's employees did not actually receive the money in a given year does not matter. For, had any of those who were eligible to receive the benefit claimed it, then it would have been impossible for the appellant to have lawfully resisted the claim. The fact that the employees thought it fit not to make a claim but to defer it does not make the obligation to pay an expense that is incurred by the appellant non-existent. Accordingly it comes within what revenue lawyers commonly call "the basket" in s. 33.

In the third place, the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour. See, *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339. The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

In the fourth place, the two authorities relied on by learned counsel for revenue are readily distinguishable. The first is *Owen v. Southern Railway of Peru Ltd* [1954] 36 TC 602. In that case the taxpayer operated a railway in Peru under a statutory scheme by virtue of which its employees were entitled to receive from it a lump sum payment on retirement, death or other termination of service. Unlike Lo & Lo and the present instance, entitlement did not depend on any prescribed length of service. The amount of the benefit, none of which was payable until service with the appellant had been terminated, was arrived at by taking a prescribed portion of the salary of the closing year of employment and multiplying it by the number of years of service. On those facts Lord Radcliffe expressed the view that but for the findings of the Special Commissioners in that case about accounting practice, the taxpayer would have been liable to tax. But that was a case of a statutory scheme. It was not a contractual obligation voluntarily undertaken by the taxpayer. Lord Radcliffe recognised the importance of this difference, for I find him saying this:

> Secondly, it must not be forgotten that these benefits and their scale are imposed by legislation, **not by voluntary contract;** and one cannot exclude the possibility that both the form and the scale of what has to be paid may be altered again without the appellant's consent. (emphasis added.)

Next there is *Nielsen Development Laboratories Pty Ltd v. Federal Commissioner of Taxation* 81 ATC 4,031. That case bears no resemblance to the present instance. It had to do with the question whether the taxpayer could deduct as expenses, provision made for its employees long service leave and annual leave even before an employee had actually gone on leave. On those very different facts the High Court of Australia held that there could be no deduction until the employee concerned actually entered upon the appropriate leave. The case therefore does not assist revenue.

For the reasons already given, I am of the view that the Special Commissioners and the High Court erred in holding against the appellant. The appeal must be allowed and the orders in the High Court and the Deciding Order of the Special Commissioners must be set aside. The relevant assessments imposed on the appellant are hereby discharged. The costs in this court and in the court below must be borne by the respondent. The deposit in court shall be refunded to the appellant.

My learned brothers Abdul Kadir bin Sulaiman, JCA (now FCJ) and Hashim bin Dato' Yusoff, JCA have seen this judgment in draft and have expressed their agreement with it.